Supreme Court, U.S.
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No. 03-54

IN THE

Supreme Court of the United States

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Petitioners,

v.

HELMSLEY-SPEAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION – FIRST DEPARTMENT

REPLY BRIEF

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PRELIMINARY STATEMENT

Nowhere in Respondent Helmsley-Spear's Reply Brief ("Resp. Br.") does Helmsley-Spear come to grips with the following undisputed facts:

- The New York courts expressly refused to apply federal law to review of the arbitration award at issue;

- Their sole legal basis for refusing to apply federal law—that the Federal Arbitration Act ("FAA") does not apply unless the conduct at issue has a "substantial effect" on interstate commerce—has been definitively established by this Court to be erroneous, *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (June 2, 2003) (*per curiam*);

- It is beyond cavil—and even Helmsley-Spear does not seriously dispute—that the operation of the properties at issue, which include the Empire State Building, "affects" interstate commerce, requiring application of the FAA;

- Though the New York Court recognized that the arbitration panel's findings were "perhaps questionable", it affirmed confirmation of the award only because, in its view, the arbitration panel's errors were not "utterly arbitrary or violative of public policy"—the applicable (and extremely deferential standard) applicable under state law; and

- The same New York Court—when it *has* applied federal law—has vacated arbitral awards that exhibit precisely the same "manifest disregard" of the law exhibited by the arbitration award at issue. *See, e.g., Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264, (1st Dep't 2003); *In re Application of Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't 2002); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 744 N.Y.S. 2d 364 (1st Dep't 2002); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001).

In short, we respectfully submit that the writ should be granted, the decision below vacated, and the case remanded to the Appellate Division so that that court can apply the correct legal standard to review of an arbitration award that even the arbitration panel recognized is "of enormous importance not just to the parties but to a significant portion of the New York City business community".

Neither of Helmsley-Spear's two purported bases for denying the writ should affect this outcome. *First*, even though the New York state courts expressly refused to apply federal law based on an erroneous interpretation of the relevant federal statute, Helmsley-Spear nonetheless argues that this Court lacks jurisdiction, allegedly because Petitioners somehow waived the fact that the operation of these partnerships affects interstate commerce. (Resp. Br. 6-8). This is nonsense: most simply—and dispositively—Helmsley-Spear presented this same "waiver" argument to the state courts, which rejected it and ruled "on the merits" that federal law did not apply. (August 14, 2002 Brief of Defendant-Respondent at 37-38). *See, e.g., Ocala*

Star-Banner Co. v. Damron, 401 U.S. 295, 299 n.3 (1971) (rejecting argument that constitutional issue was not properly before Court "since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised").

And the state court determination that no "waiver" had occurred was in any event exactly right: Petitioners timely raised the applicability of federal law in both the state trial and appellate courts. Simply put, the fact that Petitioners have also cited state laws applicable to arbitration, such as a state procedural rule requiring consolidation of proceedings relating to an arbitration (CPLR § 7502), could not and did not "waive" the applicability of the FAA to review of an matters that plainly and substantially affect interstate commerce.

Second, Helmsley-Spear contends that "application of the FAA would not change the outcome". (Resp. Br. 9). Initially, of course, this is a judgment that the New York court that is familiar with the record in this case can and should be given the opportunity to make on remand. And here, too, there is every reason to believe that Helmsley-Spear is wrong: the New York court has already expressed misgivings concerning the Award, terming its key findings "perhaps questionable"; contrary to Helmsley-Spear's suggestion, the federal standard of review—while still rigorous—does permit vacatur when an arbitration panel has manifestly disregarded the law, a basis for vacatur that does *not* exist under state law; and the fact that the panel chose to ignore (for example) the clearly established law mandating that the affairs of a partnership be managed by the partners by treating Leona Helmsley's conduct as an issue "of first impression" only confirms the necessity that this award be reviewed under the correct legal standard.

The judgment below should be vacated and the case remanded to the New York courts for further consideration in light of *Citizens Bank*.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS JURISDICTION TO REVIEW THE STATE COURTS' REFUSAL TO APPLY FEDERAL LAW

Contrary to Helmsley-Spear's contention, the Court unquestionably does have jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), for two distinct, independently sufficient reasons. *First*, the state courts themselves rejected Helmsley-Spear's argument that Petitioners had "waived" the application of the FAA—the Appellate Division erroneously determined that the FAA did not apply *not* because of any procedural default by Petitioners but rather because of its (incorrect) view that the dispute had no "substantial effect" on interstate commerce. *Second*, the state courts' determination that no "waiver" had occurred was clearly correct.

First, where, as here, the state courts have themselves reached "the merits" of the federal law issue, the law is clear that this Court's concern with the "proper raising" of the federal question "disappears": as stated in the authority that Respondent itself characterizes as the "definitive treatise on United State Supreme Court practice" (*see* Respondent's Brief at 7), "[w]here the highest state court assumes or hold that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears." Robert L. Stern et al., *Supreme Court Practice* 185 (8th ed. 2002).

That is precisely what occurred here. Petitioners raised the applicability of the FAA in both the state trial and appellate courts, while Respondent argued, just as it does here, that "by proceeding under Article 75 of the CPLR, Appellants have waived their right to proceed under the FAA." (August 14, 2002 Appellate Division Brief of Defendant-Respondent, at 37-38.) The Appellate Division clearly rejected this argument, since it proceeded to address the merits of the issue, erroneously ruling that the FAA did not apply. Thus, the "appellate court necessarily concluded that the federal . . . question had been properly presented, because it ruled . . . on the merits". *New Jersey v. Portash*, 440 U.S. 450, 455 (1979) (where highest state court to rule on merits was intermediate appellate court, case properly was before Supreme Court). *See also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971) (rejecting argument that constitutional issue was not properly before Court "since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised.")[1]

Second, the state court's conclusion on this issue was plainly correct. As Respondent concedes, Petitioners have argued in favor of applying the Federal Arbitration Act to every court that has considered the issue—to the New York County Supreme Court in Petitioners' motion to vacate the Award; to the Appellate Division in Petitioners' appeal of the lower court's decision to confirm the Award; and to the New York Court of Appeals in Petitioners' application for leave to appeal to that court.

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1. Respondent's argument that the sole basis petitioners gave the Appellate Division for applying the FAA was the fact that the parties are from different states (Resp. Br. at 7 n.2) is simply wrong. *See* September 13, 2002 Reply Br. of Plaintiffs-Appellants at 5-6.

Nor does the fact that Petitioners have also cited state authorities relating to arbitration during the course of this litigation undermine their timely presentation of this federal question. Thus, for example, Respondent makes much of Petitioners' citation to state cases in Petitioners' opposition to Respondent's motion to compel (Resp. Br. 8)—without clarifying that Petitioner was merely *responding* to state law arguments raised by Respondent. Similarly, Respondent cites Petitioners' reliance on a "recent amendment to Article 75 of New York's CPLR" in connection with post-confirmation proceedings (Resp. Br. 9)—without explaining that the amendment in question is a state court *procedural* rule requiring the consolidation of all-arbitration related applications in a single proceeding. (*See* CPLR § 7502).

In short, this Court plainly has jurisdiction to review—and correct—the state courts' erroneous refusal to apply federal law.

II. THOUGH APPLICATION OF THE FAA WILL COMPEL VACATUR OF THE ARBITRATION AWARD, THIS COURT SHOULD LEAVE THAT DETERMINATION TO THE NEW YORK COURT ON REMAND

Implicitly conceding that this dispute *does* require application of the FAA, Respondent next argues that review of the Award under the proper standard could not have affected the outcome. (Resp. Br. 9-13). Of course, this Court need not reach this issue to grant the requested relief—vacatur of the decision below and remand to the New York Court for application of the correct legal standard. However, Respondent's assertion is any event quite wrong, since application of the FAA will all but compel vacatur of this Award.

First, the New York court has already expressed its misgivings about this Award, ruling that the key findings made by the arbitration panel were "perhaps questionable". While Respondent asserts that our citation to this language somehow demonstrates our "misunderstanding" of the "manifest disregard" doctrine (Resp. Br. 10), we have consistently argued that the Panel's actions in this case—upholding the undisclosed assignment of personal services contracts and permitting Mrs. Helmsley to transfer her management rights to an interested non-partner—clearly represent a conscious, knowing refusal to apply well-established law, the essence of the "manifest disregard" doctrine. The fact that the state court was sufficiently troubled by the Panel's actions to note its reservations about the Award—while affirming its confirmation under a state law standard requiring outright irrationality for vacatur—makes it probable that application of the correct standard will affect the result.

Indeed, Respondent's efforts to defend the bizarre results reached by the Panel only further underscore the necessity of further review. Helmsley-Spear argues that "it is difficult to understand how Petitioners can even suggest that the Panel's ruling with respect to the Voting Agreement with Leona Helmsley constituted a manifest disregard of the law" (Resp. Br. 13), relying on the Panel's view that this issue was one of "first impression". Of course, treating any issue that an arbitration panel deems to be one of "first impression" as foreclosing review would place *all* such awards beyond any judicial review, eviscerating the "manifest disregard" standard; and this assertion is particularly amusing given that *both* sides in the case had emphasized the well-established law proscribing what Mrs. Helmsley had done by giving "Newco" her vote on matters relating to retention of the partnerships' managing agent. As Helmsley-Spear itself stated in one of its briefs,

"Under Section 53(1) of the Partnership Law, a partner may not assign management rights". (R. 1169-70). Yet the Panel consciously and deliberately ignored this authority, enabling Mrs. Helmsley to make just such an assignment.

Similarly, Helmsley-Spear attempts to defend the Panel's ruling concerning the undisclosed "assignment" of the contracts to manage the buildings from Helmsley-Spear to "Newco" by now claiming that the Panel concluded that "Newco" was "*not* an assignee". (Resp. Br. 13) (emphasis original). Of course, the document memorializing this transaction on its face "*assigns* to Newco . . . all . . . management agreements and rights" (R. 340) (emphasis added), and in any event the Panel nowhere even mentions or acknowledges the basis principle (repeatedly cited to it) establishing that such contracts simply cannot be transferred *at all*, under whatever guise.

Second, Respondent implies, without quite saying, that the standard of review of arbitration awards under state and federal law is the same, asserting, for example, that "the policies underlying the FAA and the CPLR are consistent". (Resp. Br. 9 n.3).[2] The short answer to this contention is that the Appellate Division has (correctly) not hesitated to vacate, in whole or in part, arbitration awards that are in "manifest disregard" of the law, *e.g. Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264 (1st Dep't 2003); *In re Application of Spear, Leeds*

2. Respondent also attempts to conflate the federal and state standards of arbitral review by citing *Westerbeke Corp. v. Diahatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002) for the proposition that vacatur under the manifest disregard standard requires a finding that the award is "'utterly arbitrary' or 'totally irrational' (essentially, the CPLR test applied by the Appellate Division)". (Respondent's Br. at 11). This representation of the *Westerbeke* holding is inaccurate; despite Respondent's misleading use of quotation marks, there is no such language in that case.

& Kellogg v. Bullseye Securities, Inc., 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't 2002); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 744 N.Y.S. 2d 364 (1st Dep't 2002); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001), yet has virtually never vacated an award under New York state law on the ground that it is entirely "irrational".

In summary, there is every reason to believe that the Appellate Division's refusal to apply the FAA was outcome-determinative in this case, and the Court should therefore remand to permit that Court to apply the correct body of law to this dispute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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